

Minutes
KITTY HAWK TOWN COUNCIL
Monday, October 1, 2012
Kitty Hawk Town Hall, 6:00 PM

Agenda

1. Call to Order
2. Moment of Silence/Pledge of Allegiance
3. Approval of Agenda
4. Service Awards: Marlene Meyer and Ben Alexander
5. Public Comment
6. Consent Agenda:
 - a.) Approval of September 4, 2012 Regular Meeting Minutes
 - b.) Revenues and Expenses Report for August 2012
 - c.) Surfrider Foundation Resolution
 - d.) Resolution Establishing the 2013 Calendar Year Town Council Meeting Dates
 - e.) FY 12-13 Budget Amendment #3
 - f.) Resolution Revising Capital Reserves Funding Caps to Include Future Purchase of a Fire Truck, Information Technology Upgrades, and Park and Trail Improvements
7. Items Removed from the Consent Agenda
8. Public Hearing
 - a.) Text Amendment: Proposal to add Subsection 42-252(c)(17) allowing “electronic gaming operations” as a conditionally permitted use in the Community Shopping Mall/Center (BC-3) district, provided that certain criteria are met.
9. Planning
 - a.) Street Right-of-Way Dedication: Proposal for the Town of Kitty Hawk to accept additional right-of-way for Putter Lane
10. New Business
 - a.) New Police Chief Selection
11. Reports or General Comments from Town Manager
 - a.) Update on Overton Property
 - b.) Sign Status at Sandy Run Park
 - c.) Annual Employee Picnic October 5, 2012
 - d.) Health Screening and Flu Shots, November 1, 2012
 - e.) Fire Department Open House, October 6, 2012
12. Reports or General Comments from Town Attorney
13. Reports or General Comments from Town Council
14. Public Comment
15. Adjourn

COUNCIL MEMBERS PRESENT: Mayor Clifton Perry, Mayor Pro Tem Gary Perry, Councilman Ervin Bateman, Councilwoman Emilie Klutz, and Councilman Richard Reid

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STAFF MEMBERS PRESENT: Town Manager John Stockton, Town Clerk Lynn Morris, Attorney Steve Michael, Planning Director Joe Heard, Finance Officer Mike Eubank, Police Chief David Ward, Fire Chief Lowell Spivey, PW Director Midgett

1. CALL TO ORDER

Mayor Perry called the meeting to order at 6:00 p.m. and welcomed and thanked everyone for attending the meeting.

2. MOMENT OF SILENCE/PLEDGE OF ALLEGIANCE

Following a moment of silence the Pledge of Allegiance was recited.

3. APPROVAL OF AGENDA

MPT Perry made a motion to approve the agenda as promulgated. Councilwoman Klutz seconded and it passed unanimously, 5-0.

4. SERVICE AWARDS

Marlene Meyer, Finance Technician - Finance Officer Mike Eubank presented the recognition of service on behalf of the town council for five years of faithful and dedicated service. He said he appreciated all the help she has given him, the department and the town.

Ben Alexander, Fire Inspector/Code Enforcement Officer - Fire Chief Lowell Spivey and Planning Director presented the award on behalf of the town council for ten years of faithful and dedicated service. Chief Spivey and PD Heard said they appreciate all his hard work for the town.

5. PUBLIC COMMENT. The General Public is invited to address the Town Council on any topic. Please sign up with the Town Clerk before the meeting and when your name is called, come forward and speak into the microphone at the podium. Please limit comments to 3 minutes.

There were no public comments.

6. CONSENT AGENDA. Items on the Consent Agenda are considered to be non-controversial, routine in nature or items not requiring a presentation to or discussion by the Town Council in order to consider the item(s). Any item may be removed for discussion by council or by any member of the audience who wants to hear the item presented and discussed.

a.) Approval of Minutes. September 4, 2012 Regular Meeting Minutes. *(An affirmative vote for the consent agenda will approve these minutes.)*

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b.) Revenues and Expenses Report for August 2012. *(An affirmative vote for the consent agenda will acknowledge this report.)*

c.) Surfrider Foundation Resolution - Last month council adopted a resolution proclaiming September 29, 2012 as Big Sweep Day. It has since been rescheduled and this resolution designates **October 27, 2012** as the BIG SWEEP DAY in Dare County. *(An affirmative vote for the consent agenda will approve this resolution.)*

d.) Resolution Establishing the 2013 Calendar Year Town Council Meeting Dates – The Town Council meets on the first Monday of each month unless it is observed as a holiday. In 2013 two holidays are observed on Council meeting dates: April 1, 2013 and September 2, 2013. Staff is recommending council meet on Tuesday, April 2, 2013 and on September 3, 2013. *(An affirmative vote for the consent agenda will approve the 2013 calendar year meeting dates.)*

e.) FY 12-13 Budget Amendment #3 - This budget amendment represents an increase of \$10,000.00 over the original Region 1-A Law Enforcement Liaison Grant funding of \$10,000 for the current budget year (FY12-13). The funds will be used by the Town of Kitty Hawk for administration and training in traffic safety enforcement programs for the region's local police departments. The total grant of \$20,000.00 is fully provided by the NCGHSP with no funds required from the Town. Approval of this amendment will appropriate the additional funds to this year's budget. *(An affirmative vote for the consent agenda will approve this budget amendment and the Governor's Highway Safety Program Local Governmental Resolution.)*

f.) Resolution Revising Capital Reserves Funding Caps to Include Future Purchase of a Fire Truck, Information Technology Upgrades, and Park and Trail Improvements – This resolution maintains a Capital Reserve Fund not to exceed \$980,000 for the following: fire apparatus current reserves \$477,624, cap \$725,000; recreational purposes current reserves \$135,982, cap \$175,000; information technology current reserves \$31,613, cap \$80,000. *(An affirmative vote for the consent agenda will approve this resolution.)*

Councilwoman Klutz moved to approve the consent agenda. The motion was seconded by Councilman Bateman and it was unanimously approved, 5-0.

7. ITEMS REMOVED FROM THE CONSENT AGENDA

No items were removed from the consent agenda.

8. PUBLIC HEARING

a.) Text Amendment: Proposal to add Subsection 42-252(c)(17) allowing "electronic gaming operations" as a conditionally permitted use in the Community Shopping Mall/Center (BC-3) district, provided that certain criteria are met.

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MPT Perry "so moved" to go into public hearing. It was seconded by **Councilman Bateman** and unanimously passed, 5-0.

PD Heard: *We are here this evening for the public hearing to add section 42-252(c)(17) allowing electronic gaming operations as a conditionally permitted use in the Shopping Mall/Shopping Center BC-3 district. As outlined in the staff report the ordinance would create an allowance for that use in the BC-3 district subject to a variety of conditions that deal with issues such as the hours of operation, minimum age limit for players and how many machines can be in a particular business. A variety of things of that nature and I would be glad to touch on those more specifically as needed.*

I want to point out again this is only going to apply in the BC-3 zoning district, which looking on the map here, would include all of the area in the darker black lines where there is a BC-3 or a BC-3 Planned Commercial Development (PCD). I am also accompanying the zoning map with a slide of aerial photographs. The BC-3 district includes all of the parcels that encompass the Home Depot property as well as the Harris Teeter and the Shoreside Shopping Center. It includes the McDonalds outparcel near the entrance. The district also includes a little bit to the west of that entrance at the front area and it appears to include a part of the Gateway Bank property. It splits that property; the original layout of lots in this area is different than it presently is. It also includes the entire Wal-Mart property as well as a chunk of the Barrier Island Station development in the area where their laundry building is. They have another storage building back there as well. And then there is a small portion, a kind of sliver running down there that appears to be half of the vacant lot next to Carawan's Seafood at the end at the other entrance into the center by Cypress Knee Trail. It would encompass all of those properties and those would be the only places presently where this type of business could locate should the council decide to leave this only in the BC-3 district.

Klutz: *Where the banks are, that is not BC-3?*

Heard: *It appears from the map that maybe a small part of the Gateway Bank property is but in general neither the majority of that property and none of the other properties next to it, BB&T ...*

Klutz: *The ABC store ...*

Heard: *The ABC store is not in it.*

Klutz: *And that is BC-2?*

Heard: *The ABC store is zoned BC-1.*

Klutz: *So BC-3 is just McDonalds, a piece of the bank lot with Gateway, and a piece of the seafood ...*

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Heard: *It is the property next to the seafood. It would be half of the vacant parcel where the "x" is on the map.*

Klutz: *And the other half of that is BC-1?*

Heard: *Correct. Also, the BC-1 district does not go all the way back on these lots. It kind of runs across ... these lots are presently all split zoned. It runs maybe two-thirds of the way back and then the ... so you have portions at the rear of those that are BC-3.*

Klutz: *But right now they are just pieces of existing lots.*

Heard: *Correct. And the bulk of those ... all of the lots are BC-1.*

Klutz: *They are mainly developed.*

Heard: *All except that one ... and there is a little sliver of a parcel by the entrance that is probably just a remnant from when they developed that entry into the center. There is a small parcel owned by Billy Roughton that is also undeveloped that adjoins Gateway Bank.*

Klutz: *The PCD, the Planned Commercial Development, that is intended to be planned out in a similar manner as the residential and the Barrier Island Station time shares, is it ... or is it all piecemeal? I always understood the PCD meant it was going to be some sort of a planned development that ...*

Heard: *There is an overall plan for the development of those areas that has some site specific design and development standards and that was the reason for looking at that planned commercial district. It was a larger property development so it encompasses that but everything that would be permitted in that district would have to be described in the document for the planned commercial development.*

The planning board, after their discussion on August 23rd, made a recommendation to the council that is encompassed in the draft you have before you. It recommends approval of adopting these provisions for electronic gaming operations in the BC-3 district. A key component is the gaming operations would only be permitted as an accessory use. In other words no one could go in and establish that as the primary use of a property or a business. No one could start up one of the internet sweepstakes parlors like in Currituck County. Those are standalone uses. This would not permit that.

Second, the way the ordinance is drafted it would only permit two electronic machines or devices in the business. It would be a relatively small scale operation as opposed to some of those other businesses that we see in Currituck where they have upwards of 50, 60, 80 or more machines in a few of those businesses. One of the other important things is a separation requirement of 500 feet from schools, day cares, religious institutions, public parks, or other electronic gaming

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operations. That would limit a cluster of these businesses or somebody looking to establish a bunch of these under one roof. I point those out and will be glad to answer any other questions that the council or others might have.

Reid: *For clarification what is proposed is a conditional use. It would go through the conditional use process of approval. And it would not be ... in a number of cases the accessory use is something that is traditionally associated with the primary principle use and it is determined by the staff. Basically it is accessory versus having it go to the council as a conditional use. So this requires it to go ...*

Heard: *The way this is set up is that this is adding the use under the list of conditional uses in that BC-3 district. It would require the applicant to go through the planning board and council to establish the uses on a case by case basis.*

Reid: *Again, accessory uses are usually things that are traditionally associated with the principle use and it is pretty obvious. I think in most cases what is accessory to certain kinds of uses ... but how ... I am kind of groping with how does a gaming ... what principle use does gaming go with? Or not go with? I mean in either case how do we deal with that as a ... somebody could come in and say, "well, I am going to ..." this is really off the cuff, "build a church but I am going to put in a couple of gaming machines." I am just raising the issue. How do we determine that?*

Heard: *You are correct. Typically an accessory use is something that is related to the primary use. There is some correlation. That is one of the reasons why it is important to note that as part of the proposal we have put in definitions for principle business use and accessory business use. I guess the bottom line is for this type of use we do not have to have that same strong correlation between what might be the principle use and the accessory use. In other words as long as it is a something that is of a lesser scale than the primary use it will at least potentially be permitted under this.*

Reid: *I could open a clothing store and put a couple of machines in the back room and say it is an accessory use?*

Heard: *That is my understanding of it the way it is drafted. Yes.*

MPT Perry: *That is the way I read it too.*

Reid: *Okay. I just wanted to clarify that.*

Klutz: *An accessory use does not have to be in any way related to what the principle business use is. I think that is the point you are trying to make here. You kind of wonder about that.*

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Mayor Perry: *It is a conditional use. That is what you are saying. We will have to, under the list of conditional uses ...*

Heard: *That is correct. It would be a conditional use requiring the process of going through the planning board and council.*

Klutz: *My questions are for Joe. Number two, under general requirements, says "no electronic gaming operations shall be located within 500 feet in any direction from any school," etcetera. One of the things we noted when we were looking at this use in the BC-1 district was the fact that BC-1 districts are in such close proximity to residential districts. There was a perception that was a problem. Then there was a lot of discussion at the planning board regarding whether a public beach is a public park and BC-3 is nowhere near a public beach but if there were ever a rezoning ... would there be any harm in adding "public beach" to that list? Since there seems to be an objection to it and it was not ... there was a lot of discussion but it did not seem to be resolved. Someone said they thought public beach would actually come under the category of public park but I do not ... I am not sure that it does so can we add public beach?*

Heard: *I will defer to the town attorney. Do you see any issue with that Mr. Michael?*

Michael: *No.*

Klutz: *I would also ask for a discussion on whether "residential districts" should be added to the list. Now that I see the big empty parcel there, or mainly empty, where this kind of a use could go ... there is some proximity to the residential lots that are I guess you would say to the south of there ...*

MPT Perry: *It is Kitty Hawk Estates.*

Mayor Perry: *Yes and you have BC-3 south of there.*

Klutz: *That is my recommendation for the general requirements. Add "public beach" and "residential district" to the list.*

Mayor Perry: *Within 500 feet. I think we need to do add that after the public hearing.*

Klutz: *Another item that also came up in the planning board minutes had to do with non-conforming operations. There was some question about whether a "legally established operation" needed to be specified. In other words should an existing legally established, which is not in there right now, electronic gaming operation continue? Do you need to put that in?*

Michael: *You are talking about if they would violate one of the conditions after the fact ... they would then become a non-conforming operation?*

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Klutz: *Do you need to specify that the use had to be legally established in the first place in order to fall under the non-conforming operation?*

Michael: *No. If you were to pass this and somebody was to open one they would be a legally established use. If they then became non-conforming they would stay as a non-conforming use. And when it ceased, because that condition could not be met again, you could not reopen another one in that spot.*

Klutz: *If something popped up that was not legally established in the first place they would just have to shut down unless ...*

Michael: *That is the position we take. If they are not permitted in Kitty Hawk right now ...*

Klutz: *We do not need to put "legally established" in there?*

Heard: *Mr. Michael, I think Councilwoman Klutz is referring to section "(c) 1" in the ordinance on the second page, whether or not ...*

Michael: *What that is talking about is one of those ... if we have one that is in operation and the town decided we are not going to force it to close right now but 12 months goes by from the time you adopt an ordinance they have to come into compliance at that point in time or shut down. We give them that grace period to bring their operation into compliance. The other part of that is if they were to go to court and challenge and get to stay in operation during that period of time then that year would continue to run from the time we pass the ordinance. Even if they won a lawsuit that said "no you could not make them shut down" then we still have the second argument that they have to meet this sunset provision we put in to bring the operation into compliance within those 12 months. You will see that in a number of the other ordinances. I think the county put two years in their ordinance.*

Mayor Perry: *They put one year with a one year extension I think.*

Michael: *You may be right. I just remember they had a two year window in theirs that somebody had to come into compliance if they were in operation.*

MPT Perry: *But since we do not allow that ... if they were illegal when they started they remain illegal unless we give them permission to continue which is what the county did in that case.*

Michael: *What I tried to do in here was anticipate that the court might say something different so this is your back up plan.*

Klutz: *So it is not necessary to put those words in there. Legally you do not have to say "an existing legally established electronic gaming operation."*

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Michael: *No because any we have in town right now from our perspective are not legally established.*

Klutz: *They would immediately be non-conforming is what you are saying and they have a year after we pass this to ...*

Michael: *Unless we shut them down.*

Klutz: *All right. Another question. I asked this in an email about the word "time" in the electronic gaming operation.*

Heard: *Mr. Michael, for your reference, this would be in the definition of "electronic gaming operation." Toward the bottom of the second page in the middle of that paragraph under number one. The word "time" is in there. What it is referring to is the way this type of business operates. The way the machine or device operates is the customer purchases it ... a variety of different ways. They basically purchase time on the device and that is how it works and is what that is referring to. "... without which time the customer would be unable to enter the sweepstakes..."*

Klutz: *But there was nothing in there saying they had to purchase time. It said all they had to do was purchase a product "whereby the customer receives one or more electronic sweepstakes tickets, cards, tokens or similar items entitling or empowering the customer to enter a sweepstakes, and without which time the customer ..." What time? There was no time. "Without which" I would say "the customer." I did not understand where "time" came into that particular sentence about what you are talking about in defining this operation. If you had referred to it prior to that because ... right now it is referring to the tokens or whatever and I am confused. I just do not know if it would cause problems when somebody is looking at definitions and trying to decide what it is that actually establishes this operation. Is it a ticket, is it a token, is it time? What is it?*

Heard: *The ticket, the token and the card is for time. All those things are ... so it is trying to cover all of the different ways that someone would potentially purchase the time on there. I would certainly be open to ... if there is a particular thought that anybody has on a better way to word that. To clarify that if we need to.*

Klutz: *Whereas the customer purchases time or receives a token, ticket, etcetera. Because you are referring to time as what is establishing their ability to play and that is ... time has not shown up anywhere in the definition up until that point. I guess I just want to make sure that it is a clear definition.*

Michael: *I am trying to find the definition that we took it from and I am having a hard time finding it.*

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Klutz: *It looked to me like something had been revised and they did not follow through on the revision.*

Michael: *I am looking at every definition we considered and none of them ... as a matter fact the shorter ones do not refer to it at all.*

Heard: *The Dare County definition where we pulled this is where it comes from word for word.*

Reid: *And it has the word time in it?*

Heard: *Yes it does.*

Michael: *It reads just like that. Currituck's does not. Theirs is very short, does not have any reference to it at all.*

Klutz: *If it does not cause a problem I am okay but I just do not like things that ...*

Mayor Perry: *If you do not understand it somebody else might not understand it.*

Michael: *I am looking at the Carteret County definition and they do not have it in theirs. And that was probably the most researched ...*

MPT Perry: *What was your other ...*

Klutz: *The other one was in number two where it says, "payment, directly or as an intended addition to the purchase of a product; whereby the customer can request a no purchase necessary free entry of one or more sweepstakes tickets or other item entitling the customer to enter a sweepstakes." I understand that to be like what Food Lion and McDonald's and those places do. When you are checking out you can get the game card and play Bingo or whatever it is they are playing. But you can also walk in there, not buy anything, and say, "I want my game card." Now how does that work?*

Michael: *Those arguments have been made to the courts already and they have not accepted that as something that would prohibit towns and counties from regulating these industries. That argument has been made; it is no different from many of the games that are run by a lot of the merchants out there. It is true there are similarities and what you are seeing in these gaming ordinances is the definitions are extremely broad to try to accomplish what they will do next because every time you pass an ordinance they come up with something else that is a little bit different. A little different twist to make the argument that this is different than what we were doing before that was outlawed.*

Klutz: *What this says is it requires them to have a free sweepstakes ticket option. Somebody can go in there ...*

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Michael: *No. It does not require them. It is just one of the options we have included in our definition if you are operating one of these establishments.*

Klutz: *Even if you are giving time away to play a game ... before you have to pay to actually play it. Because that is what ...*

Michael: *We have not had anybody giving time away.*

Klutz: *I would think not. That is just in there just because.*

Michael: *And we did define it as a "for profit" business.*

Klutz: *Yes and you are not going to make a profit giving stuff away. Given that that is in there and the following is, "this definition does not include any lottery permitted by the State of North Carolina." Should we put in any lottery "or sweepstakes" permitted by the State of North Carolina? All they run right now is a lottery but maybe they are going to get in this business because it looks profitable.*

Michael: *I would say if they do then we can come back and amend our ordinance.*

Klutz: *Okay, I think that was it. I did not get the "no purchase." I was wondering if that is in there does it mean you can go in, buy time, get your ticket with a number on it and then go home to play it?*

Michael: *I do not think that is possible. I think what they have given you is the card to get you access to the internet through their machines.*

Klutz: *Through their machines. All right.*

Mayor Perry: *Anyone else have questions of Joe?*

Klutz: *The other things I had were already changed.*

Mayor Perry: *I guess that is all for you right this minute. We are in public hearing and do we have someone signed up for the public hearing?*

Morris: *No sir. No one has signed up.*

Mayor Perry: *Does anyone wish to speak at this portion of the public hearing? Let the record show that no one came forward. A motion to go back into regular session?*

Councilman Bateman *"so moved" to go into regular session. MPT Perry provided a second and the vote was unanimous, 5-0.*

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Reid: *I received an email from a gentleman who was opposed. Does that go into the record?*

Morris: *If you would like to mention his name and whether he is for or against, it will be on record.*

Reid: *The email I received and I think we all received it, is from Roger Meilton and he stated his opposition to the ordinance for gaming. I just want to make sure that is in the record.*

Mayor Perry: *We are back in regular session and is there any more discussion on the text amendment? What does council desire to do?*

Reid: *I have some comments. I have been struggling with this for quite a while now. The attorney and I have talked about it and I guess I do not agree with some of his ... I mean I understand what he has told me but where I am coming from is as a planner I have a great deal of trouble dealing with the issue that we apparently are presented with that says we basically have to put this somewhere in the town. From a planning standpoint we do a Land Use Plan, we do a zoning map and a zoning ordinance. We do all these things and in those documents we determine what we want Kitty Hawk to look like, what kinds of businesses and what kinds of activities we think the town should have. We have always, at least in my experience in Kitty Hawk, said it is a family oriented community and we have tried to keep out uses that we felt were inappropriate. This is a family environment and I kept thinking why are we being forced to have this use in the town anywhere?*

As a staff member I went through, with the council, the Sexually Oriented Businesses. I went through lots and lots of legal documents from all over the country with the attorney at that time and I finally kind of had to accept that that was a freedom of speech, a constitutional issue, and we basically had to deal with it from that standpoint. I do not see this as a freedom of speech issue. I see it as a land use issue. This is an activity we are dealing with. With a zoning ordinance as to whether or not we should put it in the town and where we should put it. I do not see why we cannot say no, we do not think this is an appropriate land use. We do not allow a number of uses. We actually have a list of recreational uses that we do not allow and we also do not have any industrial districts. We have some industrial uses which are in heavy commercial districts but if we are forced to say we have to have ... we are forced to put something like this in here I do not see where it stops. Because basically an industry can come into town and say I want a refinery and I want to put it back at the barge landing area ... but it is not permitted in our ordinance. Therefore under this kind of logic that we must have every use that someone comes up with in the town ... we would be forced to put that in our ordinance whether we wanted it or not. I am having a lot of trouble with this because I do not see that we should be forced into this position.

I read, or at least scanned, the document I was sent "Internet Sweepstakes Cafes Survey of Law Enforcement Perceptions." What really struck me was that basically it says ... to summarize, it says the states have come around for the most part to say we need to do this because we are

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losing money. We are not getting money from these things that are operating out here therefore let's regulate them. Whether it is right or wrong for the community we want the money. And that disturbs me. I do not think that is looking out for the public interest and I think it is wrong. So I am struggling with this a lot. I do not necessarily see it as a moral issue I see it as a land use issue and I think it is a land use issue that can affect the quality of life in Kitty Hawk and I am not very happy with that.

The only other thing I have to say is if we have to go forward with an ordinance I would like to see us, and I think we can do this, but this is for the attorney to tell us we can I guess ... the ABC Board has a condition that they do a police check of anybody that applies for an ABC license. In other words you cannot be, I think, a convicted criminal or whatever and have a license for selling liquor. I would like to add in here a police background check, and this is where I do not know which is the best way to go, for both the owner of the establishment and/or also the owner of the machines. Because the machines might be provided by a company which might be totally separate from the owner. I think we need to know. If we need to know who is selling liquor I think we need to know who is doing this kind of activity in the town. So if we have to go forward with something like this then I would like to see that additional condition put in there. That is all I have at this time.

Mayor Perry: *I agree with your assessment that it is a zoning issue at this point but I also understand the attorney's viewpoint. It is because of a court case. It may not wind up being just a zoning issue at this point. It is in my opinion but the suggestion was to do it because of a previous court ruling. So that is where I stand on it and the only reason I would move forward. I do not see any difference than the bungee jumping we just turned down or the barking dogs we did not want in the town and a number of things. I do not see that being any different. It is not written in the ordinance to allow and we do not allow things that are not written in the ordinance to allow. I agree with you on that point. The only reason I would even consider doing this is because of the attorney suggesting it. I have been in trouble because I did not listen to attorneys and I have also made some good decisions when I did not listen to them. That is where I stand on this.*

Klutz: *One thing I would like to put out there when it comes to the zoning issue. In some of the examples that have been used, like a refinery and the barking dogs, those things have real physical impacts on the adjoining properties and they are businesses that certainly present land use issues. I think where this differs is that an internet café where people go in and use machines to check their email or something of that nature, I think in the past would have been permitted. It is the adoption of the use of those machines to do online gaming that became an issue in terms of the state laws that were already in effect about gambling. What has happened is that this sweepstakes approach, this is what I understand is going on ... this sweepstakes approach was used to justify that this was not gambling. It was not the land use that allowed the computer terminals to actually be installed and people using them, it was what the people were doing when they were using them. So it being a zoning or land use issue ... I am not sure that it really does neatly fit into that category.*

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Mayor Perry: *I do not see it as any different as Bingo. You purchase a card, you play, get a prize. That would be zoning if you wanted ... but it is a court thing that pushed me into making a decision to do something or not.*

Michael: *And to add to this discussion until the North Carolina Supreme Court finally rules on this we really do not know what the final outcome is going to be. We just know what the Court of Appeals did and they said this implicated free speech issues so it is a constitutional issue.*

Reid: *I envision that if the state would actually outlaw this and say you cannot have the internet cafes there would probably be some way you could actually buy something, take it home, and do it from your own home with your own computer. There would no way that I could see we could enforce something like that.*

Mayor Perry: *And that would be a home use and not a business use and ...*

Klutz: *I thought there was a federal law about online poker and that kind of thing.*

Michael: *Right. And the courts have found that ... they have not outlawed it federally at this point.*

Klutz: *I thought there was something going with that ... the only ones that were allowed were being run from foreign countries.*

Reid: *Emilie, I disagree with you on the impacts of something like this because the reports I have been looking at, and I think the police chief addressed it at the last hearing, there is an impact from a crime standpoint. There are additional things that occur as a result of these establishments. I mean it is not a barking dog but there are other activities that we do not want to bring into our town in my view.*

Bateman: *You asked about accessory uses. I think in Currituck ... Joe, did you say there are 700 machines there now?*

Heard: *Their staff told me they presently have over 700 machines in Currituck.*

Bateman: *The concern I have is ... for instance I was talking to a gentleman from Greensboro and he said in Greensboro you can go to a gas station and play the gambling machines there and you can also go to the same gas station and in the back room purchase tapes that are pornographic. That is an accessory use that guy has in that one area. You can have a restaurant and the accessory use would be the gambling and then also it is a sports bar and they are gambling on football games. They also have poker there which is poker runs and so forth. So it all goes together. I have no objection to anyone who wants to gamble but what I do have is an objection to all of them coming and not being regulated in the Town of Kitty Hawk. If we do not make some kind of decision on what is coming down on us ... and also if the Supreme Court*

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rules that it is legal and we have someone who opens up three or four places illegally and then we are stuck with them. Then we have the whole process of closing them down. We are going to be in a bind. And we are going to be back paying the attorney tons of money.

MPT Perry: *I do not quite understand ... you are damned if you do, damned if you don't because we do not know where this is going to go. We do not actually have a mandate to do anything at this point. If we do something, and let's be honest, this ordinance that is proposed is a thinly disguised attempt to prevent anything. That is what it is. We are a small town and unlike Dare County, which has an unlimited pocketbook, we have a very limited pocketbook and if we do something that is thinly disguised to attempt to shut it down altogether ... which one would be the better place to come and sue to challenge something. It would be us simply because we can least afford to defend ourselves. Gambling is around us. We do not have a mandate to do this as of yet. We are waiting on a Supreme Court decision which will do several things: one, tell us whether it has to be done or not, and two, it will give law enforcement something to work with or not work with and that is what they are struggling with. In that report you read it had to do with all government agencies and their opinion. It did not have another side to it. Let us make sure the public understands everything has two sides. That was the opinion of public servants, police officers, and federal officials and those sorts of things. So if we put it in BC-3, and thank you for putting that up Joe because that was very illuminating and I wish the public could see that as well on the screen, the intent of BC-3 is for a business to go in there and be profitable and we are trying to make that unprofitable. Does that also subject us to a greater challenge I would ask the attorney.*

Michael: *You are allowing an accessory use even though it is only two machines which will generate an additional profit for the business if that is what they desire to do.*

MPT Perry: *But BC-3 is intended for a profitable business and I guess you could argue it either way. It seems to me from the discussion I am hearing the best thing that we may do is like Currituck did and table this until we see what the Supreme Court comes out with so we have a better handle on what we need to do and must do as opposed to what we think we need to do. Perhaps be challenged on it and pass something of this nature which clearly is designed to prevent something we do not want or somebody does not want. You know if people want to gamble they are going to do it. Let's face it the Casino used to have a Bingo parlor right beside it and then everybody got on a high horse and Bingo was outlawed. So they changed it to Quizo. Well, Quizo was Bingo, but you got a prize instead of money. That was the only difference. Just the other day I had school children come to my house selling raffle tickets. I mean it is all around us and is endemic in our society. So gambling in one form or another ... I agree with you it needs to be regulated whatever form it takes so you can control some elements of it. So the police force can have some handle on it for whatever impact it may bring to us. And the revenue source is another thing to be thinking about. We need to look at all of that. I do not think we have enough information right now to make a decision so it would be my suggestion to table it until the Supreme Court does what it wants to do. I will leave it at that.*

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Bateman: *I can go along with that but what I want someone to tell me is that we are not going to wind up with 700 machines like Currituck County and if we do wind up with 700 machines what is Steve Michael going to do about it? To get them out of here.*

Michael: *I will have to sue them all.*

Bateman: *Which means your paycheck goes up again.*

Klutz: *I think putting something like this in place just for the interim ... the first thing someone is ... the first reaction is somebody who wants to open up a business without it being an accessory use, without it having a limit of two machines, is going to be to approach the town ... not sue us immediately because if we put this in place we will have something that says this type of an accessory use is available. They can then go through the process if they want to which would be to try and get a text amendment to get a use as a primary business, not accessory, to put their fifty terminals in the BC-3 district. What I think would be a deterrence in this interim period is to have something like this because then we could see what happens with the court case. If the court case says this is legal then what would be the harm of having something like this in place between now and when the court decision comes down. Is there any harm in doing that?*

Michael: *No.*

Klutz: *Would you see that as an advantage in terms of at least we have identified a district which may someday be more appropriate for this kind of activity than any other commercial district in town?*

Michael: *The folks at the School of Government encouraged people to go ahead and address the regulation issue now instead of later and I certainly understand the reluctance to do something at this point. You can go either way and Currituck has chosen not to do anything at this point in time.*

Klutz: *But they have more of an issue than we do right now.*

Michael: *They certainly do.*

Klutz: *So to do something now for them, I think, puts them in greater jeopardy because they have these businesses operating.*

Michael: *Dare County and Nags Head have passed theirs, and Kill Devil Hills has one in the works as well.*

Klutz: *I am kind of in favor of putting something there just so it exists.*

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Mayor Perry: *I think that is what the attorney is trying to do. To have something existing that does not disallow it if the court comes down that way.*

Klutz: *And I think after this court case we should probably take it up again. Certainly if there is a ban.*

Mayor Perry: *We will have to see what happens.*

Michael: *If there is a ban your ordinance will not have any affect ...*

Klutz: *Right. Once it comes from the Supreme Court is that it?*

Michael: *I would like to say yes but ...*

Mayor Perry: *Virginia does not allow it at all right? If I understand, it is outlawed in Virginia.*

Michael: *They have.*

Mayor Perry: *If the North Carolina Supreme Court does not do it I suspect this thing is going to go to the U.S. Supreme Court if they will take it. I could say let's leave this thing alone but on the advice of the attorney I say let's do this and then we can always go back and rework it. That would be my only reason for not doing what Gary said. That is kind of what I would like to do but in any case ... whether we are going to or not let's make your changes if everybody agrees to them so that much is done. If you want to make a motion to accept it okay, if not, okay. It will be there and we will do it later.*

Klutz: *The couple of changes I would like are the public beach and residential district.*

Mayor Perry: *Those two items.*

Klutz: *Those two and I think the word time should come out of that number one. And then I had a few more but Joe already made them in the revision we have.*

MPT Perry: *Want to think on it for a month? We do not normally make a decision the same night we have a public hearing.*

Mayor Perry: *We do if there is any disagreement, we are not sure, and then we agree to put it off to the next meeting. If everybody agrees to go ahead then we can go ahead.*

MPT Perry: *If you are going to agree to it somebody needs to make a motion. It will not be me.*

Reid: *We have not discussed any fees involved. Are we going to get into that or just let the state handle it? I understand they are looking into it but I ...*

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Klutz: *I am not in favor of any fees right now because we do not charge any other business in town any kind of a fee. I know this is not considered a business license or anything of that nature but the Town of Kitty Hawk does not have any kind of privilege license for our other businesses and to put one on this particular business I ...*

MPT Perry: *I disagree with that. I am going to make a motion we table this until next month's meeting.*

Reid: *I will second that.*

Mayor Perry: *Any more discussion? Did we agree that Emilie's changes be put in? The two that she brought up?*

Klutz: *You can put those in next time. We are not going to ...*

Mayor Perry: *What I am saying is we will not have to go through that ...*

Bateman: *At least when it comes back we will have a cleaner copy. The "time" issue will be out of there.*

Klutz: *So you want to do that?*

Bateman: *Yes.*

Mayor Perry: *Joe knows what they are if everybody agrees. It is okay to change those wordings.*

Bateman: *I have no problem about those.*

Reid: *What about the police check?*

Bateman: *Police check is fine with me too.*

Reid: *I think we need some wording for the police background check for the owners. Would that have to go back to the planning board to ...*

Michael: *That would take some research. I had not anticipated that coming up.*

MPT Perry: *And about the fees. Would that put it back to the planning board?*

Michael: *Fees are a separate item. A privilege license is totally separate from the land use.*

Mayor Perry: *That would come up under the license.*

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Michael: *That is correct. The town would have to adopt the privilege license. You can do it just for one business if you choose. It is a bit more risky than having something for everybody but you can do it.*

Mayor Perry: *We would change the business license we have and add that to it.*

Michael: *That is correct.*

Mayor Perry: *Is everybody on board with what we have now? We are going to vote on your motion to table it until next month.*

Klutz: *Do we have to make a motion that specifically says what those changes are or just table it to next month with the changes that have been discussed?*

Mayor Perry: *I think we can do that and Joe would give us an updated ordinance with those changes in it.*

Klutz: *Would those changes require another public hearing?*

Michael: *Not the public beach. What was your other one?*

Klutz: *Residential district.*

Michael: *And residential. I do not think that would. If we are going to include Richard's background check that probably is a different animal.*

Klutz: *How about we discuss that one next month because we are going to have to take it up again.*

Mayor Perry: *You will bring that information back to us.*

Michael: *Right. If we have a number of changes we might have to send it back through. Let's see when we get here the next time ... let's see what you want to change and we can determine whether there is enough in there that is substantial and we need to redo it.*

Mayor Perry: *We have a motion and a second to table it until next month. If there is no more discussion all of those in favor?*

The vote was unanimous, 5-0.

9. PLANNING

a.) Street Right-of-Way Dedication: Proposal for the Town of Kitty Hawk to accept additional right-of-way for Putter Lane

Heard: *What I plan to do in my report is touch on the issue before you and discuss or provide you with details of how we got to this point if you so desire. The last page of the staff report shows a small arc of right-of-way in front of Lot 1 at the very northern end and west side of Putter Lane. The proposal is for that little piece of property to be turned over to the town and added to the right-of-way of Putter Lane. The intent of the applicant is to create a slightly greater amount of frontage along Putter Lane for three lots.*

The final page shows the potential layout of those lots. If council decides to accept this right-of-way the applicant will submit a plat to recombine those parcels into this configuration or something very similar to it. Since they are not increasing the area or the number of lots it would be an exempt plat that would be approved administratively. It would not come back to the planning board or council. I will be glad to explain whatever you would like regarding the circumstances but that is it in a nutshell.

Mayor Perry: *I wish they had drawn a straight line instead of a semi-circle but other than that I do not have a problem with it.*

Klutz: *I think they only had one choice because they did not have enough room.*

Mayor Perry: *Right. They had to do it in order to make it a buildable lot.*

Klutz: *It is my understanding that the deed for the current Lot 4 contains a description of the lot as it was prior to the subdivision in 2008, including a portion of the former Lot 3. Is that correct?*

Heard: *That is correct.*

Klutz: *The three remaining lots ... there is one owner of those?*

Heard: *That is correct. All of the three remaining lots are under one ownership.*

Klutz: *They have redefined the lot description so we are not going to have this happen again?*

Heard: *They will be once the plat is approved. That is part of the plat approval. They submit a deed ... and the issue originally did not arise with the deed but with the deed referenced in the mortgage and when the company that held the mortgage foreclosed that was the description of the property they had. They had a right to foreclose on that property described.*

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Klutz: *Does title insurance deal with this?*

Michael: *They cannot come in and make these lots comply. They give you money.*

Heard: *As part of the recording for the plat they would have to revise the deeds accordingly. The county would require it.*

Councilman Bateman moved to accept the dedication of the additional right-of-way by Sea Scape Inc. that is proposed on the attached survey and all costs associated with preparing and recording of a deed, acceptable to the town attorney, will be borne by the donor of the property. MPT Perry seconded and it passed unanimously.

10. NEW BUSINESS

a.) New Police Chief Selection

Manager Stockton said as part of the process for the selection of a new police chief staff found the personnel policy requires that when an employee is promoted to a higher grade council approval is required if there is more than a 5% increase in salary. Sgt. Johnson is presently at a grade 62, step 12, and he will be moved to grade 71, step 1. Staff is asking for council approval of the raise when he takes over on January 1, 2013.

Councilwoman Klutz made a motion for approval of the salary increase for the promotion of Sgt. Johnson to chief of police on January 1, 2013 to increase his grade from 62, step 12 to grade 71, step 1. MPT Perry seconded the motion and it passed unanimously.

11. REPORTS OR GENERAL COMMENTS FROM TOWN MANAGER

a.) Update on Overton Property – Manager Stockton said Mr. Carawan's wife has signed the deed for the property. The attorney is in the process of petitioning the court to open an estate and to appoint an administrator. An administrator locates and collects the assets, pays the debts of the estate and then distributes the remaining assets to the heirs. The only debt known of at this point are the real estate taxes which is approximately \$6,000, Mr. Overton's funeral expenses approximately \$1,750 and a man who claims that Mr. Overton owes him a thousand dollars. If there are insufficient funds to pay the debt the administrator can sell the property. There may be enough value in the personal property to pay some of the debt but if there is not, the property may need to be sold with the balance of the sale price going to the town after the debt has been paid.

Attorney Michael added the estate is open and his paralegal is the administrator for the estate. Town assistance is needed to get in the house and see what is in there and what should be done with it. The administrator of the estate has every right to take control of all of the assets, do what is necessary to protect those assets and to see what value can be gotten out of the estate.

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Ultimately, anything other than the real property might go to Mr. Carawan. He will have to try and identify if there are any other family members. Right now there does not seem to be any indication there is but tracing back will be done to find out for sure.

MPT Perry asked if the property has to be sold would it have to be sold "as is" rather than torn down because of the flooding and all the items in the house.

Attorney Michael answered the administrator can make those kinds of decisions. The property may have more value as a vacant lot than it has with what is on it and that will be looked into.

If enough money is generated to pay all of the debts of the estate and everything then the real property would not be sold and assuming Mr. Carawan is the only heir then the property will belong to the town.

b.) Sign Status at Sandy Run Park – Manager Stockton reported the tree identification signs have been installed and the aerial map sign has been made and installed also. There are seven interpretative signs that are being made and should be completed in a couple of weeks.

Councilwoman Klutz asked PD Heard if anything had been figured out for the artist recognition on the artwork.

PD Heard replied there will be a small statement on the seven drawings recognizing Meg Rubino as the artist.

c.) Annual Employee Picnic October 5, 2012 – Manager Stockton reminded council about the annual employee picnic to be held on Friday, October 5th at 12 o'clock noon at Kitty Hawk Park.

d.) Health Screening and Flu Shots, November 1, 2012 – Manager Stockton advised everyone about the health screening and flu shots on Thursday, November 1, 2012 from 2 p.m. to 5 p.m. It will be open to the public and held at the town hall.

MPT Perry asked about non-Medicare people and MA Clopton replied everyone is welcome and it is all free.

Councilwoman Klutz asked who is sponsoring it and what types of screenings would be done. MA Clopton replied The Outer Banks Hospital is the sponsor and blood pressure, cholesterol, skin cancer, glucose and diabetes screenings will be offered.

e.) Fire Department Open House, October 6, 2012 – Manager Stockton said the fire department's open house is on Saturday, October 6th from 10 a.m. to 2 p.m. and invited everybody to attend.

12. REPORTS OR GENERAL COMMENTS FROM TOWN ATTORNEY

There were no further comments from the attorney.

13. REPORTS OR GENERAL COMMENTS FROM TOWN COUNCIL

a.) **Controlled Burn of the Foreman's Property** – Councilman Bateman asked about the rescheduling of this from the spring.

Fire Chief Spivey replied the department is waiting for the tourist population to thin out because US 158 will be closed. It will be some time this winter or early spring.

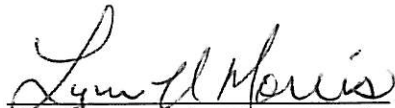
14. PUBLIC COMMENT

There were no public comments.

15. ADJOURN

MPT Perry made a motion to adjourn. It was seconded by Councilman Bateman and passed unanimously, 5-0. Time was 7:20 p.m.

These minutes were approved at the *November 5, 2012* council meeting.


Lynn U. Morris, Town Clerk


Clifton G. Perry, Mayor